

In Re Madden: **The Threat to the New Journalism**

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In von Bulow v. von Bulow, the Second Circuit, in a widely-adopted opinion, announced a test for determining who may assert the qualified privilege protecting journalists from compelled disclosure of confidential sources (in other words, for determining who qualifies as a journalist). Under this test, a court must determine whether, at the inception of the newsgathering process, the individual intended to disseminate information to the public. In a recent case, In re Madden, the Third Circuit invoked this test in denying standing to the operator of a 1-900 wrestling hotline. This Case Comment contends that the Third Circuit's focus on the subject matter and entertaining nature of the 1-900 hotline operator's reports violates the fundamental principles of the First Amendment, and may threaten the "new journalism," which combines satire, muckraking, gossip, and humor with traditional reporting. The author proposes an analytical framework that advances a broad, functional definition of "journalism," focused more exclusively on the intent to disseminate information before its receipt, and encompassing all vehicles for information and opinion. This functional definition, the author contends, will foster an environment in which the fundamental purposes of the First Amendment are fulfilled, and in which courts need not decide whether a journalist may invoke the privilege based on the content of his speech.

I. INTRODUCTION

A new style of journalism has emerged from the fragmentation of the American media consumer. This style, fueled by the need to attract viewers and readers in an age of overwhelming media choices, combines muckraking, satire, gossip, and humor with traditional reporting. *Newsweek* describes the new journalism this way:

Just the facts won't do anymore. Today's savviest political tone-setters, from Webheads to columnists, comedians to ideologues, are the ones who use technology, entertainment, attitude and humor to deliver their take on the news—and sometimes to make it. . . . The New News is about cutting through the clutter, creating new channels for information and, in a lot of cases, getting a laugh—or a gasp.¹

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The new journalism, widely disparaged by "traditional" journalists, might best be embodied in the form of internet columnist (or, depending on one's point of view, gossip monger) Matt Drudge. Drudge is a self-taught reporter who proudly trumpets the fact that he is not a traditional journalist. While many scoff at his techniques and point with indignation to his sometimes-inaccurate reports, Drudge has become a major player in the new journalism.² He became a must-read when his Drudge Report first broke the Monica Lewinski scandal.³

The new journalism goes beyond Matt Drudge, but critics often point to him when decrying the downfall of traditional journalism. While his influence may wane in the future, and his proverbial "fifteen minutes of fame" may draw to a close, the imprint of the new journalism appears as if it will last long after the public has forgotten Matt Drudge. Even bastions of traditional journalism have been inspired to co-opt a more sensational form of reporting.⁴

Since the Supreme Court's ruling in *Branzburg v. Hayes*,⁵ most federal jurisdictions have afforded journalists a qualified privilege against the compelled disclosure of sources and information obtained in the newsgathering process.⁶

¹ *Titans of 'tude*, NEWSWEEK, Jan. 18, 1999, at 32, 32. The report features "20 stars of an era in which wit and fresh venues are changing how Americans get their news." *Id.*

² See Michael Godwin, *Internet Libel*, 8 SETON HALL CONST. L.J. 757, 757-58 (1998) (discussing Drudge's reporting style and a libel suit brought against him); see also Cynthia Cotts, *Wishful Reporting*, VILLAGE VOICE, Jan. 19, 1999, at 38 (describing Drudge as someone who "would gladly downplay accuracy and fairness for entertainment value" when reporting a story); *The Drudge Report: An Internet-Age Walter Winchell Upsets Mainstream Media and the White House*, ORANGE COUNTY REG., Apr. 12, 1998, at G1 (describing Drudge as an eccentric internet gossip working from his apartment).

³ See Godwin, *supra* note 2, at 757 ("[I]f you read his coverage of the Monica Lewinski scandal, it's fascinating, fascinating to see how often Drudge has been right."); *Titans of 'tude*, *supra* note 1, at 32 (calling Drudge one of the stars of the "New News").

⁴ See Joel Brown, '98 *In Review: Not A Pretty Picture: Would the President's Denial of Sexual Relations Be Any Clearer in High-Definition? We'll Never Know*, ELECTRONIC MEDIA, Jan. 4, 1999, at 20, 21 (describing CNN's "Operation Tailwind" report about nerve gas use in Vietnam as "at best unsubstantiated, and at worst completely wrong"). Brown writes: "The original '60 Minutes' topped that with Dr. Jack Kevorkian providing video of himself killing a guy. Then, at year's end, [60 Minutes producer Don] Hewitt apologized, on air, for showing part of a bogus British drug-smuggling documentary." *Id.* at 21.

⁵ 408 U.S. 665 (1972).

⁶ Some type of qualified journalist's privilege has been adopted in all but three federal circuits. See Kevin J. Baum, Note, *The Journalist's Privilege: Ensuring That Compelled Disclosure Is the Exception, Not the Rule*, 3 VILL. SPORTS & ENT. L. FORUM 557, 564 n.31 (discussing the federal courts' acceptance of a qualified journalist's privilege following *Branzburg*). Because the privilege is not absolute, it can be overcome:

Because the Supreme Court stated that the notion of the press comprehends every sort of publication of news and opinion,⁷ and because the First Amendment prohibits discrimination against nontraditional journalism,⁸ most

This test contemplates consideration of a myriad of factors, often uniquely drawn out of the factual circumstances of the particular case. Each party comes to this test holding a burden. Initially, the movant must make a prima facie showing that his claim of need and relevance is not frivolous. Upon such a showing, the burden shifts to the objector to demonstrate the basis for withholding the information. The court then must place those factors that relate to the movant's need for the information on one pan of the scales and those that reflect the objector's interest in confidentiality and the potential injury to the free flow of information that disclosure portends on the opposite pan.

Cusumano v. Microsoft Corp., 162 F.3d 708, 716 (1st Cir. 1998) (citations omitted).

Some courts have gone beyond the balancing test and have adopted formalized tests to determine whether a journalist must disclose relevant information. See *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) ("(1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?"); see also *Baum, supra*, at 570-71.

In some circuits, the privilege against compelled disclosure extends to nonconfidential sources and information. See *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) ("[W]e hold that the journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality."). However, some jurisdictions have held that the privilege applies only to confidential materials. See, e.g., *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) ("We conclude that newsreporters enjoy no qualified privilege not to disclose nonconfidential information in criminal cases."). The courts have also disagreed as to whether the privilege extends to both criminal and civil cases. Compare *Shoen*, 5 F.3d at 1292 ("[T]he journalists' privilege recognized in *Branzburg* was a 'partial First Amendment shield' that protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike.") (quoting *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975)) with *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("Although *Branzburg* may limit the scope of the reporter's First Amendment privilege in criminal proceedings, this circuit has previously held that in civil cases, where the public interest in effective criminal enforcement is absent, that case is not controlling.").

⁷ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 799-800 (1978) (Burger, C.J., concurring) ("[T]he Press Clause focuses specifically on the liberty to disseminate expression broadly and 'comprehends every sort of publication which affords a vehicle of information and opinion.'") (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)).

⁸ See U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."); see also *Bellotti*, 435 U.S. at 799-801; *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) ("Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals.'") (quoting *Lovell*, 303 U.S. at 444, 450, 452); Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 32-33 (1986) ("The Supreme Court has generally defined the term 'press' very broadly, as a result of which the [F]irst [A]mendment and [E]qual [P]rotection clauses have

courts have adopted a very broad test to determine who has standing as a journalist. This test, articulated in *von Bulow v. von Bulow*,⁹ requires a factual inquiry into the intent of the individual asserting the privilege.¹⁰ One may assert the privilege if, at the inception of the newsgathering process, that individual has the intent to disseminate the information to the public.¹¹ This test, which has come to be known as the *von Bulow* test, has been applied broadly to afford protection to authors and academics as well as journalists.¹²

However, a recent decision by the Third Circuit, *In re Madden*,¹³ casts doubt on the ability of the *von Bulow* test to adequately protect nontraditional journalists, specifically those who practice the new journalism. That case involved a professional wrestling commentator's attempt to assert the privilege for reports he made on a 1-900 telephone line.¹⁴ While a topic as trivial as professional wrestling may not set off alarms for First Amendment defenders, the court's reasoning leaves the new journalism vulnerable to increased threats of compelled disclosure.

In Part II, this Comment will analyze *Branzburg* and its impact on federal courts' adoption of the journalist's privilege. Part III will examine how the *von Bulow* test rose to prominence while Part IV discusses how the *Madden* court misapplied the test. Part V explains the potential consequences *Madden* poses for the new journalism. Finally, Part VI attempts to combat a potential *Madden* analysis by offering an expanded functional definition of the press to determine who may qualify for the journalist's privilege.

II. BRANZBURG V. HAYES AND THE FEDERAL COURTS

The qualified journalist's privilege against compelled disclosure arose from the confusing and controversial *Branzburg*¹⁵ opinions. The Supreme Court consolidated the cases of three reporters who refused to testify before grand

been held to prohibit discrimination against 'non-establishment' and 'irregular' media.'").

⁹ 811 F.2d 136 (2d Cir. 1987).

¹⁰ *Id.* at 144.

¹¹ *Id.*

¹² See *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714-15 (1st Cir. 1998) (granting privilege to academic researchers); *Shoen v. Shoen*, 5 F.3d 1289, 1293-94 (9th Cir. 1993) (granting privilege to the author of an investigative book); Kraig L. Baker, Comment, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739, 749 (1994) (discussing when courts have granted the privilege to nontraditional journalists).

¹³ 151 F.3d 125 (3d Cir. 1998).

¹⁴ See *infra* notes 68-76 and accompanying text.

¹⁵ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

juries.¹⁶ Although the plurality opinion ruled against an absolute privilege for journalists,¹⁷ Justice Powell's concurrence emphasized the limited nature of the Court's holding.¹⁸ His frustratingly short opinion¹⁹ endorsed a qualified privilege that balances "freedom of the press and the obligation of all citizens to

¹⁶ See *id.* at 667–79. Two of the consolidated cases involved Paul Branzburg's coverage of Kentucky's illegal drug culture. Branzburg's newspaper "carried a story under [his] by-line describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana . . ." *Id.* at 667. A later story included interviews with "several dozen drug users in [Frankfort]" and Branzburg's observations of "several unnamed drug users." *Id.* at 669.

The other two cases involved coverage of the Black Panther Party. Television Reporter Paul Pappas was allowed to remain at Black Panther headquarters in New Bedford, Massachusetts on the condition that he not "disclose anything he saw or heard . . . except an anticipated police raid, which Pappas, 'on his own,' was free to photograph and report as he wished." *Id.* at 672. The police raid never materialized and Pappas was later called before a grand jury investigating Black Panther activity. *Id.* at 672–73. Earl Caldwell covered the Black Panthers for the *New York Times*. The government sought to compel "[n]otes and tape recordings of interviews . . . reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and the activities of said organization . . ." *Id.* at 675–76 n.12. The journalists refused to testify by citing their First Amendment rights as news reporters:

[The reporters'] press First Amendment claims . . . [which] may be simply put: that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment.

Id. at 679–80.

¹⁷ The journalists in the *Branzburg* cases "[did] not claim an absolute privilege against official interrogation in all circumstances . . ." *Id.* at 680. Rather, they argued for a balancing test that weighed the reporter's First Amendment rights against the government's need for the information. See *id.* Professor Marcus has remarked: "Strangely, Justice White either misconstrued the reporters' position, or chose to interpret it as encompassing an assertion of absolute privilege. Indeed, much of the opinion is written as if the media representatives had specifically requested that the Court announce an absolute First Amendment privilege." Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 823 (1984).

¹⁸ See *Branzburg*, 408 U.S. at 709 (Powell, J., concurring) ("I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding.").

¹⁹ See Marcus, *supra* note 17, at 829 ("[T]he initial complaint to be leveled against the extremely short concurring opinion of Justice Powell is its brevity.") (citation omitted).

give relevant testimony with respect to criminal conduct.”²⁰ Because five justices in *Branzburg* recognized some kind of journalist’s privilege, a majority of the circuits²¹ interpreted a qualified privilege from Powell’s concurrence and the dissent.²²

²⁰ *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

²¹ See, e.g., *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) (“Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information.”); *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998) (“[W]e have recognized that when a journalist, in the course of gathering the news, acquires facts that become a target of discovery, a qualified privilege against compelled disclosure appertains.”); *Shoen v. Shoen*, 5 F.3d 1289, 1292–93 (9th Cir. 1993) (interpreting *Branzburg* “as establishing such a qualified privilege for journalists”); *von Bulow v. von Bulow*, 811 F.2d 136, 142–43 (2d Cir. 1987) (finding that the *Branzburg* Court “recognized . . . that a qualified privilege may be proper in some circumstances because *newsgathering* was not without First Amendment protection”); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986) (“In determining whether the journalist’s privilege will protect the source in a given situation, it is necessary to balance the interests involved.”); *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) (“We indicated . . . that a qualified reporter’s privilege under the First Amendment should be readily available in civil cases.”); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980) (holding “that a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants”); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977) (“[T]he Court’s discussion in both the majority opinion of Justice White and the concurring opinion of Justice Powell recognizing a privilege which protects information given in confidence to a reporter *is* important.”). But see *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987) (“[W]e decline to join some other circuits . . . [that] have thereupon adopted the qualified privilege balancing process urged by the three [sic] *Branzburg* dissenters and rejected by the majority.”).

Courts and scholars believed that the Eighth Circuit adopted the qualified journalist’s privilege in *Cervantes v. Time, Inc.*, 464 F.2d 986, 991 (8th Cir. 1972) (holding that statements that “touch and concern issues of public or general concern” must have actual malice to be defamatory). See *Shoen*, 5 F.3d at 1292 n.5; *Baker*, *supra* note 12, at 747 n.64. The Eighth Circuit, however, recently declared that the question of a journalist’s privilege “is an open one in this circuit.” *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 n.8 (8th Cir. 1997).

²² See *Baker*, *supra* note 12, at 747 (“Four justices concluded that reporters could be compelled to disclose their sources; four justices said they could not be so compelled; and Justice Powell took a middle position by allowing compelled disclosure in some circumstances but not in others.”); *Monk*, *supra* note 8, at 24 (“Thus a majority, consisting of the four dissenters and Powell, explicitly recognized a constitutional right to protect sources.”). For an excellent discussion of the *Branzburg* decision, see *Marcus*, *supra* note 17, at 821–39.

A. *Branzburg's Unheeded Warning*

The *Branzburg* plurality rejected the journalist's privilege,²³ in part, because of the difficulties in determining who would be eligible for the privilege.²⁴ It wrote: "We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order."²⁵ The Court warned that a constitutional journalist's privilege would require courts to define those journalists who qualified for the privilege, a questionable procedure in light of traditional First Amendment doctrine.²⁶ Courts attempting to define the press would face difficulty because the Press Clause "comprehends every sort of publication which affords a vehicle of information and opinion."²⁷ The plurality emphasized that freedom of the press is a "fundamental personal right" that offers the same protection to the lonely pamphleteer as it does for the major metropolitan newspaper.²⁸

Although the Supreme Court has recognized the role of the press in American society,²⁹ *Branzburg* reinforces the Court's view that the First Amendment does not entitle the institutionalized press to heightened protection.³⁰ The Court in *Branzburg* wrote that "[f]reedom of the press . . . 'is

²³ The Court, however, welcomed Congress and the state legislatures to pass journalist's privilege statutes. See *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) ("Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards"). While Congress has not acted, over half the states have adopted some type of press shield law. See Marcus, *supra* note 17, at 859–67 (discussing the statutory response to the journalist's privilege).

²⁴ *Branzburg*, 408 U.S. at 703–04. The plurality also emphasized the importance of the grand jury system, the public interest in effective law enforcement, and the belief that the press has flourished for decades without constitutional protection. *Id.* at 687–88, 698–99.

²⁵ *Id.* at 703–04.

²⁶ *Id.* at 704.

²⁷ *Id.* (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)).

²⁸ See *id.*

²⁹ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781–82 (1978) ("The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.").

³⁰ See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 668 (1990) ("[T]he press' unique societal role may not entitle the press to greater protection under the Constitution") (citing *Bellotti*, 435 U.S. at 782); *Bellotti*, 435 U.S. at 782–83 ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten.") (citations omitted); Tung Yin, Comment, *Post-Modern Printing Presses: Extending Freedom*

not confined to newspapers and periodicals.”³¹ Rather, freedom of the press belongs to all individuals who assert their First Amendment rights.³² According to the *Branzburg* plurality, courts would risk granting extra constitutional protection to the institutional press if they attempted to classify those journalists eligible for the privilege.³³ Eventually, the Court surmised, the application of such a privilege could lead to discrimination based on content, an outcome traditionally prohibited by the First Amendment.³⁴

B. The Federal Courts' Response

A majority of federal jurisdictions ignored *Branzburg*'s warning and embraced the qualified journalist's privilege.³⁵ Before the Second Circuit developed a test to handle nontraditional journalism,³⁶ very few cases had grappled with the issue of granting the journalist's privilege to nontraditional journalists.³⁷ However, those cases were mindful of the historic connotation of

of Press to Protect Electronic Information Services, 8 HIGH TECH L.J. 311, 334 (1993) (discussing the Court's "refus[al] to make the institutional press stronger than the non-institutional press").

³¹ *Branzburg*, 408 U.S. at 704 (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 450, 452 (1938)).

³² See *id.* ("Freedom of the press is a fundamental personal right."); see also *Bellotti*, 435 U.S. at 802 (Burger, C.J., concurring) (stating "the First Amendment does not belong to any definable category of persons or entities" but to "all who exercise its freedoms").

³³ See Lyrrisa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 229-30 (1998). Lidsky points out the following:

If the Court were to create a constitutional privilege to gather news, the Court would have to resolve an issue it has traditionally avoided: who is the press? The Court would be forced to decide whether to continue to accord the 'lonely pamphleteer' as much First Amendment protection as the institutional press.

Id.

³⁴ See *Branzburg*, 408 U.S. at 705 n.40 ("[T]he First Amendment ordinarily prohibits courts from inquiring into the content of expression By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content.") (citations omitted).

³⁵ See *supra* note 21 (discussing the federal courts' adoption of the journalist's privilege).

³⁶ See *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) (emphasizing the journalist's intent at the inception of the newsgathering process). Since its inception, four circuits have used the *von Bulow* test to determine whether an individual has standing to assert the journalist's privilege. See *infra* note 53.

³⁷ See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977) (granting the

the press³⁸ and the Supreme Court's assertion that the informative function of the press has been performed by those outside of the traditional media.³⁹

In *Silkwood v. Kerr-McGee Corporation*,⁴⁰ a documentary filmmaker investigating the death of a nuclear power worker assured the film's participants that their identities would be kept confidential.⁴¹ The filmmaker asserted the journalist's privilege when Kerr-McGee tried to compel the disclosure of confidential information surrounding Karen Silkwood's death.⁴² While never proclaiming the issue dispositive, the *Silkwood* decision considered the filmmaker's intent at the inception of gathering news for the documentary:⁴³ "His mission in this case was to carry out investigative reporting for use in the preparation of a documentary film. . . . [I]t cannot be disputed that his intention, at least, was to make use of this in preparation of the film."⁴⁴ This notion inspired the seminal decision on journalist's privilege and nontraditional journalism, *von Bulow v. von Bulow*.⁴⁵

III. THE RISE OF *VON BULOW*

The Second Circuit fashioned the *von Bulow* test in response to an author's attempt to assert the journalist's privilege. The underlying suit alleged that Claus von Bulow secretly injected his wife with drugs causing her to lapse into a permanent coma.⁴⁶ Martha von Bulow's children attempted to compel the disclosure of an unpublished manuscript about the events surrounding Claus von Bulow's criminal prosecution.⁴⁷ The court ruled against the manuscript's author

privilege to a documentary filmmaker); *Apicella v. McNeil Lab., Inc.*, 66 F.R.D. 78, 84-85 (E.D.N.Y. 1975) (granting the privilege to the chief executive officer of a pharmaceutical trade publication).

³⁸ See *Silkwood*, 563 F.2d at 437 (noting that the Supreme Court has not limited the privilege to traditional journalism).

³⁹ See *Branzburg*, 408 U.S. at 705 ("The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists."); *Apicella*, 66 F.R.D. at 84 (describing the groups other than traditional reporters who perform the informative function of the press) (citing *Branzburg*, 408 U.S. at 705).

⁴⁰ 563 F.2d 433 (10th Cir. 1977).

⁴¹ See *id.* at 435.

⁴² See *id.* at 434-35.

⁴³ See *id.* at 436-37.

⁴⁴ *Id.*

⁴⁵ 811 F.2d 136 (2d Cir. 1987).

⁴⁶ See *id.* at 139.

⁴⁷ See *id.* at 138.

because she originally gathered information for personal uses, such as the vindication of her close friend, Claus von Bulow.⁴⁸ By focusing on the author's intent, however, the *von Bulow* decision formally paved the way for nontraditional journalists to assert the journalist's privilege.

A. *The von Bulow Test*

The *von Bulow* opinion explained how to determine whether an individual qualifies as a journalist.⁴⁹ To successfully claim the privilege, an individual must "demonstrate, through competent evidence, the intent to use material . . . to disseminate information to the public and that such intent existed at the inception of the newsgathering process."⁵⁰ Furthermore, the court explicitly stated that nontraditional journalists could successfully assert the privilege.⁵¹ Although one portion of *von Bulow* has been controversial,⁵² courts have readily endorsed both the intent-based test and the proposition that nontraditional journalists may assert the privilege. To date, four circuits have explicitly adopted the *von Bulow* test.⁵³

⁴⁸ See *id.* at 144. The author, Andrea Reynolds, accompanied Claus von Bulow during the criminal proceedings that resulted in his acquittal on charges of "assault with intent to murder his wife." *Id.* at 139.

⁴⁹ See *id.* at 142.

⁵⁰ *Id.* at 144.

⁵¹ See *id.* at 142 ("[A]n individual successfully may assert the journalist's privilege . . . even though he may not ordinarily be a member of the institutionalized press."); *id.* at 144-45 ("[T]he protection from disclosure may be sought by one not traditionally associated with the institutionalized press . . .").

⁵² The opinion recognized a privilege for non-confidential sources of information. However, some courts have ruled against such a privilege. See *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (holding that the qualified journalist's privilege does not protect nonconfidential information in criminal cases). But see *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) (holding that the journalist's privilege applies to resource materials even in the absence of confidentiality).

⁵³ Besides the Second Circuit, the Ninth, Third, and First Circuits have explicitly endorsed the *von Bulow* test. See *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714-15 (1st Cir. 1998) (granting the privilege to academics); *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (granting the privilege to investigative reporters and newsgatherers); *Shoen*, 5 F.3d at 1293-94 (granting the privilege to investigative authors). The D.C. district court applied the *von Bulow* test in an unpublished decision. See *Alexander v. FBI*, 186 F.R.D. 21, 50 (D.D.C. 1998) (applying the *von Bulow* test). One court has rejected *von Bulow*, but that was a state court refusing to extend the state's "media subpoena law." See *Matera v. Superior Court*, 825 P.2d 971, 975 (Ariz. Ct. App. 1992).

B. *The False Promise of von Bulow*

The intent-based analysis of *von Bulow* appears flexible enough to cover those situations where nontraditional journalists serve the traditional functions of the press. The test's backers assert that by looking into the newsgatherer's intent, courts should be able to avoid the mode of dissemination-based analysis that frightened the *Branzburg* plurality.⁵⁴ The test's application to all modes of dissemination ostensibly makes the test flexible enough to adapt to changes in media and the ways in which people receive news.⁵⁵ Finally, by requiring the intent to disseminate information to the public, the test grants the privilege only to members of the legitimate press, another *Branzburg* concern.⁵⁶ The *von Bulow* test should be the final word on standing to assert the journalist's privilege. However, the test has a fatal flaw in its deceptively simple wording. This flaw, which has only recently been exposed, threatens the changing face of journalism.

The *Branzburg*⁵⁷ plurality worried that application of a journalist's privilege might lead to content-based discrimination. Justice White demonstrated this fear by invoking hypothetical sham newspapers, designed by criminals to shield illegal activity from grand jury inquiry.⁵⁸ Explaining his position, Justice White wrote: "It might appear that such 'sham' newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into the content of expression"⁵⁹ The *von Bulow* test seems to overcome this problem by looking into the intent of the newspaper operators. If the operators intend for their newspaper to shield activity from grand jury proceedings, rather than as a means of disseminating information, they will fail to qualify as journalists.⁶⁰

However promising *von Bulow* may seem, the test does not prevent all inquiries into content. The term "newsgathering" requires, by its very definition,

⁵⁴ See Baker, *supra* note 12, at 755 ("Since the test emphasizes the intent behind the newsgathering process and not the mode of dissemination, it is consistent with the Supreme Court's recognition that the press includes all publications that contribute to the free flow of information.").

⁵⁵ See *id.*

⁵⁶ See *id.* ("The test does not grant standing to any person with a manuscript or film, but requires an *intent* to disseminate *news* to the *public* at the *inception* of the newsgathering process.") (emphasis in original).

⁵⁷ 408 U.S. 665 (1972).

⁵⁸ See *id.* at 705 n.40.

⁵⁹ *Id.* (citations omitted).

⁶⁰ See Baker, *supra* note 12, at 752–53 (comparing newsletters to the "sham" newspapers in *Branzburg*).

a content-based determination of what constitutes "news." This determination invites the type of content-based discrimination that *Branzburg* attempted to thwart.⁶¹ Furthermore, some advocates of the *von Bulow* approach assert that courts should make value determinations based upon the finished products of individuals claiming the privilege.⁶² While the situations that give rise to a *von Bulow* analysis have been rare, they are likely to become more prevalent as the internet and alternative media sources play larger roles in the way Americans receive their news.⁶³ Members of the "new" media should be concerned that content-driven applications of the *von Bulow* test, like the analysis in *In re Madden*,⁶⁴ pose a threat to their ability to disseminate news.

IV. *IN RE MADDEN* AND THE INADEQUACY OF THE *VON BULOW* TEST

While the *von Bulow* test has been embraced by courts⁶⁵ and at least one commentator,⁶⁶ *In re Madden* demonstrates the test's inability to adequately address situations involving nontraditional journalism. Although deceptively simple, the *von Bulow* language invites the type of content-based discrimination that the Supreme Court feared when deciding *Branzburg*.⁶⁷ As *In re Madden* demonstrates, judicial notions of what journalism should be can defeat the strict application of the *von Bulow* test. The silent biases against nontraditional journalism, whether in content or in form, should not be allowed to defeat an intent-based analysis. *In re Madden*, however, invites courts to completely forgo questions of intent and cloak their contempt for nontraditional journalists in the language of *von Bulow*.

⁶¹ See *Branzburg*, 408 U.S. 705 at n.40.

⁶² See Baker, *supra* note 12, at 760–63 (arguing that the privilege should not be extended to a very expansive class of supposed creative fiction authors).

⁶³ Two circuit courts applied the *von Bulow* test in 1998 alone. Before 1998, no circuit court had ruled on the test since 1993. See *supra* note 53.

⁶⁴ 151 F.3d 125 (3d Cir. 1998).

⁶⁵ See, e.g., *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (finding the *von Bulow* Court's reasoning persuasive); see also *supra* note 53 (discussing the jurisdictions that have adopted the *von Bulow* test).

⁶⁶ See Baker, *supra* note 12, at 755 ("The *von Bulow* test should be adopted by all circuits to determine whether an individual or group has standing to claim the journalist's privilege.").

⁶⁷ See *Branzburg v. Hayes*, 408 U.S. 665, 705 n.40 (1972) ("By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content.").

A. *The Underlying Facts*

In re Madden stemmed from a lawsuit involving the two largest professional wrestling promotions in the United States.⁶⁸ The World Wrestling Federation (WWF) sued World Championship Wrestling (WCW) claiming copyright infringement, unfair trade practices, and other state law claims.⁶⁹ The suit arose when two popular WWF wrestlers, Kevin Nash and Scott Hall, contracted with the rival WCW.⁷⁰ The WWF claimed that WCW attempted to deceive the public by fostering the belief that "inter-promotional matches"⁷¹ would take place on WCW television programs.⁷² The WWF alleged that WCW's 1-900 telephone hotline, featuring the reports of Mark Madden, purposely disseminated false information to support the ruse.⁷³ In an attempt to discover the source of the reports, the WWF deposed Madden.⁷⁴ Madden, however, invoked the journalist's privilege and refused to reveal his sources.⁷⁵

Using the *von Bulow* test, the district court found that Madden could assert the privilege because he had the intent to disseminate information at the inception of the newsgathering process.⁷⁶ The WWF appealed the decision.

⁶⁸ 151 F.3d at 126.

⁶⁹ *See id.*

⁷⁰ *See Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 981 F. Supp. 65, 67 (D. Conn. 1997).

⁷¹ The WWF does not allow their wrestlers to engage in matches with WCW wrestlers. The WWF would not want their wrestlers to "lose" to WCW wrestlers because the public might view WCW wrestlers as superior. Furthermore, the WWF does not want to promote the rival promotion's product. The WCW shares this policy for the same reasons. As a result, wrestling fans have long been enticed by the prospect of inter-promotional matches featuring WWF wrestlers "competing" against WCW wrestlers for the first time.

⁷² *See Titan Sports*, 981 F. Supp. at 67.

⁷³ *See id.* In addition to providing content for 1-900 hotline reports, Madden worked as a sportswriter for the *Pittsburgh Post-Gazette*. *See, e.g.*, Mark Madden, *Boon over Miami: Hockey Interest Grows in Florida Sunshine, Where Even the Latin Community Embraces It*, PITT. POST-GAZETTE, May 24, 1996, at C1, available in 1995 WL 7659965 (discussing professional hockey's success in Southern Florida); Mark Madden, *Third Strike Means Curtains for Cleveland*, PITT. POST-GAZETTE, Jan. 8, 1995, at C6, available in 1995 WL 3357955 (discussing a professional football game between the Pittsburgh Steelers and the Cleveland Browns).

⁷⁴ *See In re Madden*, 151 F.3d 125, 126 (3d Cir. 1998).

⁷⁵ *See id.*

⁷⁶ *See Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 967 F. Supp. 142, 145 (W.D. Pa. 1997) *rev'd*, *In re Madden*, 151 F.3d 125 (3d Cir. 1998).

B. The Madden Court's Misapplication of von Bulow

An examination of the appellate court's reasoning demonstrates potential content-based discrimination as well as discrimination against the mode of dissemination. The Third Circuit endorsed the *von Bulow* test as appropriate,⁷⁷ but the court overturned the district court's application of the test.⁷⁸ Specifically, the court believed that professional wrestling did not qualify as news. Because wrestling involves choreographed matches featuring larger-than-life characters, the court stated that Madden authored creative fiction while disseminating hype and advertisement. Moreover, the court found, "Madden's information was given to him directly by WCW executives."⁷⁹ As a result, the court held that he did not act as a journalist.

Further, the Third Circuit ruled against Madden because he mixed entertainment with reporting. Because his reports included entertainment, the court stated that Madden did not intend to disseminate information to the public. Instead, as an author of entertaining fiction, the court found that Madden intended to create a work of art or entertainment.⁸⁰

⁷⁷ See *Madden*, 151 F.3d at 130 ("The district court correctly looked to *von Bulow* as the appropriate test to use in determining who qualifies as a 'journalist' for purposes of claiming privilege.").

⁷⁸ See *id.*

⁷⁹ *Id.*

⁸⁰ See *id.* Madden's experience as a professional journalist did not persuade the Third Circuit even though "prior experience as a professional journalist may be persuasive evidence of present intent to gather [information] for the purpose of dissemination." *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987). The *Pittsburgh Post-Gazette* employed Madden while he provided commentaries for the 1-900 wrestling hotline. Although Madden's newspaper articles covered traditional sports such as football, the *Post-Gazette* sometimes published articles he wrote about professional wrestling. See, e.g., Mark Madden, *Gritty Cactus Jack to Wrestle at Carlynton*, PITT. POST-GAZETTE, Jan. 19, 1995, at W11, available in 1995 WL 33643331 (profiling Cactus Jack, a famous professional wrestler scheduled to wrestle in Western Pennsylvania)[hereinafter Madden, *Gritty Cactus*].

Madden's article about Cactus Jack, in particular, features many of the elements that comprise Madden's hotline commentaries. Madden's "commentaries promote upcoming WCW wrestling events and pay-per-view television programs, announce the results of wrestling matches and discuss wrestlers' personal lives and careers." *Madden*, 151 F.3d at 126. In comparison, the Cactus Jack article promotes an independent wrestling card at a Pennsylvania High School. See Madden, *Gritty Cactus*, *supra* at W11 ("Cactus Jack, 30, brings his act to Carlynton High School for an indy show Saturday at 7:30 p.m."). Furthermore, the article discusses some of Cactus Jack's previous matches, including a "pay-per-view TV match with partner Kevin Sullivan against the Nasty Boys." *Id.* Finally, Madden's article discusses Cactus Jack's career and personal life. See *id.* (discussing Cactus Jack's career as an independent wrestler and his Western Pennsylvania roots).

1. *Madden Was Not Gathering News*

According to the *In re Madden* court, professional wrestling does not qualify as news: “[T]he district court read the *von Bulow* decision too expansively and in doing so elided the requirement that the individual be engaged in the activity of newsgathering or investigative reporting.”⁸¹ The opinion states that even though Madden “sought, gathered, or received” materials from WCW to disseminate on the hotline, more would be required to qualify for the privilege.⁸² The court reiterated that *von Bulow* requires Madden to gather news.⁸³

However, this analysis cannot be made without a court deciding what should or should not be considered news, a result that runs afoul of constitutional principles.⁸⁴ While paying lip service to Madden’s intent, the Third Circuit ultimately decided that his reports were not news and therefore unworthy of protection.⁸⁵

Although mode of dissemination is not a factor in a *von Bulow* analysis, *see von Bulow*, 811 F.2d at 144–45, the similarities between Madden’s hotline commentaries and his newspaper articles demonstrate the essential weaknesses in the *Madden* court’s logic. If the court denied standing to Madden the newspaper reporter, instead of Madden the hotline commentator, the court would engage in clear content discrimination. A newspaper reporter is, by definition, a traditional journalist who gathers information with the intent to disseminate that information in newspaper articles. For that reason, it would be difficult for the Third Circuit to deny standing to Madden the newspaper reporter without blatantly discriminating against content related to professional wrestling. Madden’s wrestling hotline reports featured information similar to the information contained within his newspaper articles. Nonetheless, the court refused to protect Madden the hotline commentator. This result leaves the court with a difficult choice should an individual raise the journalist’s privilege for a newspaper article about professional wrestling. A court faced with this issue may grant standing and acknowledge that the *Madden* decision discriminated on the basis of mode of dissemination, or deny standing altogether, and acknowledge that it discriminates on the basis of content.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *See Branzburg v. Hayes*, 408 U.S. 665, 705 n.40 (1972) (“[T]he First Amendment ordinarily prohibits courts from inquiring into the content of expression . . . and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste.”) (citations omitted).

⁸⁵ This Case Comment expresses no opinion as to whether Madden’s sources and information should have been privileged. Instead, this Case Comment argues that Madden should have been allowed to assert the privilege. It is quite possible that, under a balancing test, the information might prove to be discoverable. Madden’s interest in confidentiality and the potential injury to the free flow of information might be of such little value as to warrant compelled disclosure. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998) (discussing the balancing test). Madden’s sources were all WCW employees, so the interests in anonymity do not raise the same implications as a corporate or government whistleblower

Professional wrestling has received little critical attention in the United States.⁸⁶ However, wrestling remains one of the most popular forms of entertainment in the world.⁸⁷ One may debate the merits of wrestling, but the genre's popularity cannot be questioned. The election of former wrestler Jesse Ventura as governor of Minnesota,⁸⁸ along with the attention—albeit skeptical—of the mainstream press, demonstrates the public interest in professional wrestling. Moreover, when dealing with privacy and publicity issues, at least one federal court has announced the newsworthiness of professional wrestling and the public figure status of professional wrestlers.⁸⁹

Because of the public interest in professional wrestling, the Third Circuit apparently engaged in discrimination based on the content of Madden's reports in declaring that information about wrestling does not qualify as news.⁹⁰ The

fearing retaliation. Furthermore, the interests in the free flow of information concerning professional wrestling may not warrant extra constitutional protection. Jurisdictions applying a formalized three-part test may come to similar conclusions. See Baum, *supra* note 6, at 571 (discussing the test used by some federal courts). This Case Comment contends, however, that Madden's intention was to disseminate news about wrestling and that such an intention existed at the inception of the newsgathering process. As a result, he should have been allowed to assert the qualified journalist's privilege provided by *von Bulow*. Whether the information would withstand the qualified privilege should have no bearing on this analysis.

⁸⁶ See Chris Heath, *Stone Cold Steve Austin*, ROLLING STONE, Dec. 24, 1998–Jan. 7, 1999, at 122, 130 (describing the small amount of academic literature on wrestling). Some critics contend that the lack of serious attention allows professional wrestling to escape scrutiny for allegedly anti-social and offensive programming that would not be tolerated in other forms of mass entertainment. See Phil Mushnick, *Sportsview, Wrestling: Who's Pile-Driving Whom?*, TV GUIDE, Dec. 19–25, 1998, at 54, 54 ("A vast majority of the media still considers pro wrestling a cartoon world. So a twisted, sickening industry grows wealthy while operating with impunity. . . . On any given night kids are 'entertained' by warfare between racially segregated gangs, ethnic stereotyping, degradation of women and wrestlers who wave toward their crotches . . ."); Phil Rosenthal, *Family Fight: Promoters Don't Wrestle with Their Consciences*, CHI. SUN TIMES, Jan. 28, 1999, at 39 (criticizing the WWF for targeting children with "raunchy" and "tasteless" programs).

⁸⁷ See *Breakthroughs '98 New Faces We Couldn't Help but Notice*, PEOPLE, Dec. 28, 1998–Jan. 4, 1999, at 114, 114–15 (stating that wrestling attracts some 40 million viewers weekly); Heath, *supra* note 86, at 123 (saying that on Monday nights, more young men will watch wrestling than watch professional football).

⁸⁸ See generally Steve Lopez, *Ready to Rumble "Hoo-Yah!" Jesse Ventura Takes Office as Governor of Minnesota with the Battle Cry of the Navy SEALs*, TIME, Jan. 18, 1999, at 38, 38–40 (describing Ventura's election and inauguration).

⁸⁹ See *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 88–89 (2d Cir. 1989) (finding genuine issue of material fact as to whether posters of professional wrestlers in newsstand publication were for purposes of trade and not incidental to the dissemination of news).

⁹⁰ See *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) ("Mr. Madden was not

First Amendment protects entertainment, as well as ideological speech.⁹¹ Furthermore, the First Amendment protects journalists who report on matters related to entertainment and sports. The *New York Times Co. v. Sullivan*⁹² defamation standard of actual malice⁹³ applies to journalists reporting on those entertainers and athletes deemed to be public figures.⁹⁴ However, the *In re Madden* court deemed professional wrestling without journalistic merit. Such a result clearly violates traditional First Amendment doctrine protecting speech from inquiries into content.⁹⁵

2. Madden's Reports Were Creative Fiction

In re Madden proclaimed that Madden's reports on professional wrestling amounted to little more than creative fiction.⁹⁶ Obviously, the storylines and matches of professional wrestling are scripted and choreographed,⁹⁷ but the

investigating 'news,' even were we to apply a generous definition of the word.”).

⁹¹ See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”) (citations omitted).

⁹² 376 U.S. 254 (1964).

⁹³ The Constitution requires “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279–80.

⁹⁴ See, e.g., *Carson v. Allied News Co.*, 529 F.2d 206, 208–09 (7th Cir. 1976) (finding that a popular television entertainer was a public figure and that the actual malice standard applied); *Bell v. Associated Press*, 584 F. Supp. 128, 130–32 (D.D.C. 1984) (finding that a professional football player was a public figure and that the actual malice standard applied).

⁹⁵ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 799–800 (1978) (Burger, C.J., concurring) (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)) (“[T]he Press Clause focuses specifically on the liberty to disseminate expression broadly and ‘comprehends every sort of publication which affords a vehicle of information and opinion.’”); *Branzburg v. Hayes*, 408 U.S. 665, 705 n.40 (1972) (“By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content.”); William P. Marshal & Susan Gilles, *The Supreme Court, The First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 171 (“[B]oth superficial and serious journalism are entitled to equal constitutional weight.”); Monk, *supra* note 8, at 32–33 (“The Supreme Court has generally defined the term ‘press’ very broadly, as a result of which the First Amendment and Equal Protection clauses have been held to prohibit discrimination against ‘non-establishment’ and ‘irregular’ media.”).

⁹⁶ See *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998).

⁹⁷ See Heath, *supra* note 86, at 123 (describing professional wrestling as a kind of vicious cooperation with exaggerated story lines).

performers and executives involved with wrestling are real people. The underlying suit that spurred *In re Madden* demonstrates that genuine events can be associated with the world of wrestling. The WWF's popular Scott Hall and Kevin Nash, the performers who portrayed the characters of Razor Ramon and Diesel, sought employment with a rival organization.⁹⁸ The wrestlers' decision to jump to WCW was not motivated by a storyline or choreographed chicanery. Instead, the wrestlers were motivated by "lucrative, guaranteed contracts."⁹⁹ The Third Circuit decided that Madden's work was fiction because his reports were about wrestlers who portrayed fictional characters within the wrestling ring.¹⁰⁰ This is not precisely true: his reports were about the real-life business dealings of the men behind the characters. Just as a story about a popular wrestler's legal problems cannot be considered fiction,¹⁰¹ a story about a wrestler's contract status has a basis in reality.

3. Madden Used Improper Journalistic Techniques

In applying the *von Bulow* test, the court examined the methods Madden used to obtain information. According to the decision, Madden could not be

⁹⁸ See *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 981 F. Supp. 65, 66–67 (D. Conn. 1997) (describing the circumstances behind Hall and Nash's departure from the WWF).

⁹⁹ *Id.* at 67. The WWF tried to dispel any notion that Hall and Nash were involved in a storyline by announcing that the performers were no longer associated with the company. See *id.*

¹⁰⁰ See *Madden*, 151 F.3d at 130 ("Madden's work amounts to little more than creative fiction about admittedly fictional characters who have dramatic and ferocious sounding pseudonyms like 'Razor Ramon' and 'Diesel.'").

¹⁰¹ See Mark Bixler, *Wrestler Pleads Guilty to Assault in Cherokee*, ATLANTA CONST., Dec. 9, 1998, at B1 (stating that a popular wrestler pled guilty to felony assault charges); Dave Goldiner, *Sable Slams WWF with Harass Suit*, N.Y. DAILY NEWS, June 5, 1999, at 8 (discussing a sexual harassment suit filed against the WWF by a popular female wrestler).

Quite aside from the legal problems of some wrestlers, the tragic death of professional wrestler Owen Hart underscores the very *real* nature of certain events within the industry. Hart died during a pay-per-view wrestling program when he fell to the ring after being suspended above the arena floor. See Jerry Adler et al., *Death in the Ring*, NEWSWEEK, June 7, 1999, at 64, 64–65 (describing the circumstances surrounding Hart's death). Some of the nation's most influential newspapers covered Hart's death. See, e.g., Colin Nickerson, *Wrestler's Life Ended Where It Began*, BOSTON GLOBE, May 27, 1999, at A1; *Stunt Turns into Tragedy for Pro Wrestler Owen Hart*, WASH. POST, May 25, 1999, at D02.

Clearly, the *Boston Globe* and *Washington Post* would have standing to claim the journalist's privilege for stories related to Owen Hart's death. The Third Circuit, however, might not grant standing to Madden for hotline commentaries discussing the Hart tragedy. Already, the court declared that Madden was not a journalist when it refused to grant standing for reports involving the real-life contract status of two professional wrestlers.

involved in reporting because all of his information was given to him directly by WCW employees.¹⁰² This investigation into reporting techniques, basing privilege on a supposedly "good" journalistic style, ignores the critical question of the *von Bulow* test. The *von Bulow* court wrote that "[t]he primary relationship between the one seeking to invoke the privilege and his sources must have as its basis the intent to disseminate the information to the public garnered from that relationship."¹⁰³ Madden's relationship with WCW was that of an independent contractor. However, the primary purpose of that relationship was to obtain information from WCW executives to disseminate over the 1-900 hotline.¹⁰⁴ Madden's method of newsgathering should not be a factor in a supposedly intent-based analysis.¹⁰⁵ The First Amendment protects journalism that the courts deem negligent, unethical, or just plain lousy.¹⁰⁶ For the court to express disapproval of Madden's journalistic technique, under a test that demands no such inquiry, shows bias against the subject of his reports.

¹⁰² See *Madden*, 151 F.3d at 130 ("He uncovered no story on his own nor did he independently investigate any of the information given to him by WCW executives.").

¹⁰³ *von Bulow v. von Bulow*, 811 F.2d 136, 145 (2d Cir. 1987).

¹⁰⁴ The *von Bulow* test raises an interesting question as to whether the journalist's privilege applies to corporate spokespeople. Obviously, a corporate executive would not qualify for the privilege when offering comments to the media. The test's language, however, suggests that individuals employed *solely* as corporate spokespersons might have standing to assert the privilege: "The primary relationship between the one seeking to invoke the privilege and his sources must have at its basis the intent to disseminate information to the public." *Id.* While this result seems odd, it reinforces the "practical and conceptual difficulties" inherent in a constitutional journalist's privilege. See *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). Courts, and the public, however, can overcome some of these difficulties by thinking of the privilege as qualified and not absolute. The balancing test of a qualified privilege will likely fix many of the anomalous results.

¹⁰⁵ Although superfluous to a *von Bulow* analysis, the fact that Madden uncovered no stories of his own should be examined against the backdrop of the industry he covers. The only sources for stories concerning professional wrestling are WCW and the WWF. Madden was given reports by one of those groups, WCW, and by virtue of his status as a WCW hotline correspondent was likely unable to contact sources within the WWF. It should be noted, however, that Madden has been critical of WCW programming on his hotline commentaries.

¹⁰⁶ See, e.g., *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (stating that "failure to investigate before publishing, even when a reasonably prudent person would have done so" is not enough to overcome the constitutional protection of the actual malice standard); Marshall & Gilles, *supra* note 95 at 170-71 (declaring that the Supreme Court's First Amendment decisions have encouraged the development of irresponsible journalism).

4. *Madden Mixed Entertainment with Journalism*

The Third Circuit proclaimed that Madden, as an author of creative fiction, primarily intended to entertain rather than to disseminate news or gather information.¹⁰⁷ The court found important Madden's admission that his reports mixed entertainment with reporting.¹⁰⁸ Clearly, Madden's reports had to entertain as well as inform. To survive in an environment where people pay \$1.99 a minute to hear his reports, a dry commentary devoid of entertainment would likely hinder repeat business and, in turn, Madden's livelihood. The fact that Madden's opinions were at times outrageous or satirical should not change an analysis under *von Bulow*.¹⁰⁹ Journalism frequently includes a blend of opinion and information; in fact the First Amendment comprehends such a result.¹¹⁰ *Von Bulow* stands for the principle that the institutionalized press should not have the sole right to claim the privilege because the informative function of the press is also performed by, among others, dramatists and novelists.¹¹¹ Most plays and books strive to entertain as well as inform, and many of those include outrageous social satire and criticism. If those authors intend to disseminate information through their plays and books at the inception of the information gathering process, the *von Bulow* test protects them. Madden had that intent when he received materials from WCW.¹¹² What separates

¹⁰⁷ See *Madden*, 125 F.3d at 130.

¹⁰⁸ See *id.* Madden testified that he tried to get people excited by including satire, hyperbole, and humor in his reports. He further stated that WCW told him "to be a little crazy" and entertain people with "off the wall stuff." *Id.*

¹⁰⁹ See *von Bulow v. von Bulow*, 811 F.2d 136, 143 (2d Cir. 1987) ("[T]he critical question in determining if a person falls within the class of persons protected by the . . . privilege is whether the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation."). The *von Bulow* decision does not count as critical the means in which the reporter intends to convey the information to the public. Furthermore, the First Amendment protects sensational journalism as well as traditional journalism as evidenced by the fact that the *National Enquirer* exists under the same rules as *The New York Times*. See, e.g., *Eastwood v. National Enquirer*, 123 F.3d 1249, 1251 (9th Cir. 1997) (applying actual malice standard to *Enquirer* report).

¹¹⁰ See *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The press . . . comprehends every sort of publication which affords a vehicle of information and opinion.").

¹¹¹ See *von Bulow*, 811 F.2d at 144-45 (citing *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972)).

¹¹² The *von Bulow* test contemplates "the intent to use material—sought, gathered or received—to disseminate information to the public." *Id.* at 144. "The district court believed that because Madden 'sought, gathered or received' materials from the WCW with the intention of disseminating that material, he was a journalist." *Madden*, 151 F.3d at 130. The Third Circuit required more, namely the investigation of judicially-approved news.

Madden from the others is simply his subject matter and presentation.

5. *Madden Did Not Intend to Disseminate News*

The *In re Madden* opinion concludes its misapplication of the *von Bulow* test by contending that even if Madden was gathering news, his claim of privilege would still fail because, as an author of entertaining fiction, he lacked the intent to disseminate that information.¹¹³ Madden's primary purpose, according to the court, was the creation of a work of art or entertainment.¹¹⁴ This portion of the opinion contradicts itself and ignores *von Bulow* while still claiming to adhere to the test. The court never explains how Madden authored creative fiction, and thereby lacked the intent to disseminate information, even as he received information to disseminate from WCW executives. Furthermore, *von Bulow* stated that the informative function of the press can be performed by those who also entertain.¹¹⁵

In today's journalistic landscape, where the line between information and entertainment is increasingly blurred, this portion of *In re Madden* is especially troubling. The *In re Madden* court appears to read an entertainment element into the *von Bulow* test and allows courts to selectively choose which vehicles of information and opinion are worthy of protection. The opinion states that the privilege should not be afforded to fiction *or* entertainment writers who have a license with the facts that a traditional journalist lacks.¹¹⁶ This portion of the opinion, if relied upon in subsequent cases, may permit courts greater range in passing judgment on the merits of a report.

V. THE IMPLICATIONS OF *IN RE MADDEN* FOR THE NEW MEDIA

Thanks in large part to the internet, a "punk kid" from Los Angeles can sit next to William Safire on "Meet the Press."¹¹⁷ Increased competition for viewers

¹¹³ See *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998).

¹¹⁴ See *id.*

¹¹⁵ See *von Bulow*, 811 F.2d at 145 (stating that "[t]he informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.") (quoting *Branzburg*, 408 U.S. at 705).

¹¹⁶ See *Madden*, 151 F.3d at 130 ("Fiction *or* entertainment writers are permitted to view facts selectively, change the emphasis or chronology of events or even fill in factual gaps with fictitious events—license a journalist does not have.") (emphasis added).

¹¹⁷ See Sherry Ricchardi, *Double Vision*, AM. JOURNALISM REV. Apr. 1998, at 30, 32 (referring to the notion that Drudge would appear on "Meet the Press" as unthinkable); Frances Katz, *These 10 Sites are Among the Best of 1998*, MINNEAPOLIS-ST. PAUL STAR TRIBUNE, Dec. 29, 1998, at E11 (describing Matt Drudge as a punk kid whose Drudge Report made him a must read).

and readers has resulted in some pretty outlandish stunts by practitioners of the new journalism. To attract attention to a debuting program, one group of journalists decided to broadcast an unsubstantiated report about nerve gas use in Vietnam.¹¹⁸ During the all-important sweeps period,¹¹⁹ one outrageous program decided to broadcast a real-life physician-assisted suicide.¹²⁰ This program later trumped the suicide with excerpts from an exciting documentary on drug-smuggling that was, unfortunately, a sham.¹²¹ How about that gossipy talking head droning on about "blue dresses," "DNA evidence," and what the definition of "is" is? Although the mainstream press would like to attribute these stories to an amateur reporter with a new modem and a web browser, these examples of journalism were foisted upon the American public by CNN, *Time*, and "60 Minutes," all bastions of traditional journalism.

The boundaries between traditional journalism and entertainment have blurred.¹²² "Journalists regularly appear on Jay Leno and David Letterman, in sitcoms . . . and in movies. . . . The result: a further dimming of distinctions between public policy versus entertainment and traditional journalism versus Hollywoodization"¹²³ The increased entertainment value of journalism can be, at least in part, attributed to the fragmentation of the American media consumer. In an era when viewers have a hundred channels and on-line access, many feel that traditional journalism will fail to attract the public's attention.¹²⁴ The journalists may be right considering the decreased circulation and dwindling ratings accompanying traditional journalism, as well as the increased influence of nontraditional media outlets.¹²⁵ While many point to programs such as Hard

¹¹⁸ See *supra* note 4 and accompanying text.

¹¹⁹ Sweeps periods determine advertising rates for local television stations.

¹²⁰ See *supra* note 4 and accompanying text.

¹²¹ See *id.* at 21.

¹²² See Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 935 (1996) (discussing the increased blurring of the boundary between entertainment and news); Lyle Denniston, *From George Carlin to Matt Drudge: The Constitutional Implications of Bringing the Paparazzi to America*, 47 AM. U. L. REV. 1255, 1258 (1998) ("The press . . . is less and less able to distinguish between what is printed on the pages of the *New York Times* and that which appears in the *National Enquirer*, or between what can be scanned at washingtonpost.com and what is found at Matt Drudge's website, The Drudge Report."); Ricchiardi, *supra* note 117, at 32 (describing the notion that politics and entertainment have merged).

¹²³ Ricchiardi, *supra* note 117, at 32.

¹²⁴ See Gerald F. Uelmen, *Leaks, Gags, and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943, 958 (1997) ("Increasing costs and decreasing ratings have reportedly led network news shows to adopt the lower standards of local news programs, which in turn are pressured by the 'general Geraldoization' of television programming.").

¹²⁵ See George F. Will, *Washington Is Becoming Less Relevant to Public*, COLUMBUS

Copy¹²⁶ as an example of sensationalized news, the “legitimate” news programs that view Hard Copy with disdain have adopted many of the tabloid genre’s techniques.¹²⁷ The decline of substance is not a problem unique to television. Many newspapers have become more outrageous to combat lost circulation and increased competition.¹²⁸

A. Applying the von Bulow Test After *In re Madden*

The merger of journalism and entertainment poses problems for the journalist’s privilege under an *In re Madden* analysis. Nontraditional journalists face a lack of protection if they engage in the new journalism. However, journalists associated with the institutional press will be allowed to claim the privilege even if they mix entertainment with reporting. A court would grant Matt Drudge’s privilege claim if he worked for the *New York Times*. However, because he reports on the internet, *In re Madden* would permit discrimination against Drudge’s reporting style.

The *In re Madden* court stressed that “fiction or entertainment” writers have a license with the facts that precludes status as a journalist.¹²⁹ Thus, under *In re Madden*, courts become arbiters of what should be classified as entertainment or as journalism. As already discussed, an emphasis on entertainment has invaded the mainstream media’s presentation of journalism. For instance, NBC

DISPATCH, Jan. 3, 1999, at 3B (discussing the falling ratings for network television, local news programs, and the drop in newspaper circulation from 63.1 million in 1984 to 56.7 million in 1997). While the approach of journalism to lagging consumption seems to be an increased level of sensationalism, many critics contend that the public has abandoned traditional journalism because of the increased sensational content. See Denniston, *supra* note 122, at 1255 (“In this era [of the Lewinski scandal], the press is nowhere near to meeting the levels of propriety that large segments of the public tend to believe should be the absolute minimum.”); Ricchiardi, *supra* note 117, at 31 (discussing the public’s dissatisfaction with the media’s coverage of the Monica Lewinski scandal).

¹²⁶ Hard Copy is one of the most successful tabloid television news programs. In that genre, “the outrageous is highly valued.” Uelman, *supra* note 124, at 956.

¹²⁷ See Bogus, *supra* note 122, at 935 (“NBC executive Reuven Frank has decreed that every news story should ‘display the attributes of fiction, of drama. It should have structure and conflict, problem and denouement, rising action and falling action, a beginning, a middle and an end.’”); Uelman, *supra* note 124, at 958 (discussing how tabloid stories become a part of the mainstream media).

¹²⁸ See Ricchiardi, *supra* note 117, at 32 (stating that a quarter century ago, “the New York Post [sic] was a bastion of liberalism, not Murdochism”). Even the *New York Times* is not immune from changing journalistic standards. See Bogus, *supra* note 122, at 936 (describing that the average continuous quote or paraphrase from presidential candidates in the *Times* dropped from fourteen lines in 1960 to six lines in 1992).

¹²⁹ See *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (emphasis added).

executives have recently declared that all news stories should resemble fiction.¹³⁰ How should a court seeking to apply the *von Bulow* test, in light of *In re Madden*, treat the merger of journalism and entertainment? Is NBC's primary purpose to entertain or to disseminate news?

Clearly, an employee of NBC news will have standing to assert the journalist's privilege. Evidence of employment by a news organization weighs very heavily in a *von Bulow* analysis.¹³¹ Regardless of the entertainment value of traditional journalism, no court likely will find a sensationalized story on "Dateline NBC"¹³² so pervasively entertaining that it defeats even an *In re Madden* analysis of *von Bulow*. However, because traditional and nontraditional journalism have become so inseparable, the pedigree of working for a news organization might make the difference that results in standing to assert the journalist's privilege.¹³³ Although the institutional press may be as entertaining or irreverent as the nontraditional press, the *In re Madden* analysis could exclude nontraditional journalists from protection. This situation, of course, counters the principle of *von Bulow* that intent, rather than experience as a journalist, determines standing.¹³⁴

1. Applying *In re Madden* to Matt Drudge

A hypothetical application of the *In re Madden* reasoning to an individual like Matt Drudge demonstrates the problem with this way of viewing *von Bulow*. If Drudge, or one of his cohorts in the new media, tried to assert the privilege, an unsympathetic judge could strike a claim of privilege even if the intent to disseminate information was present at the inception of newsgathering. Without the pedigree or attachment to an institutionalized news organization, the lone

¹³⁰ See Bogus, *supra* note 122, at 935.

¹³¹ See *von Bulow v. von Bulow*, 811 F.2d 136, 144 ("[P]rior experience as a professional journalist may be persuasive evidence of present intent to gather for the purpose of dissemination . . .").

¹³² A Dateline NBC telecast secretly rigged a GMC truck's crash test with remote controlled explosives. This incident led to the resignation of reporters, producers, and the president of NBC News. See Thomas D. Yannucci, *Debunking the "Big Chill"—Why Defamation Suits by Corporations are Consistent with the First Amendment*, 39 ST. LOUIS U. L.J. 1187, 1200-01 (1995).

¹³³ In an unpublished decision, the D.C. district court granted the journalist's privilege to a former Clinton aide called as a witness in the "filegate" controversy. Applying the *von Bulow* test, the court granted standing to claim the journalist's privilege in part based on the aide's employment with ABC News. The employment in a journalistic capacity included regular appearances as a commentator and news analyst. See *Alexander v. FBI*, 186 F.R.D. 21, 50 (D.D.C. 1998).

¹³⁴ See *von Bulow*, 811 F.2d at 144.

pamphleteer of the cyber age could lose the protection afforded the legitimate—albeit equally sensationalized—press. The *In re Madden* decision threatens those who practice the new journalism only if they do not belong to the institutional press.

a. *Drudge Is Not Gathering News*

Traditional journalists often refer to Matt Drudge as a “cybergossip.”¹³⁵ Many have claimed that he is in the business of spreading rumors, not documented facts.¹³⁶ One court has already commented on Drudge’s journalistic merit in a personal jurisdiction context, and the results were not favorable to any future claim of journalist’s privilege.¹³⁷ A court applying *von Bulow* could just as easily say that Drudge does not gather news, but merely spreads gossip or innuendo. At least one court reached this conclusion, even after Drudge broke the story that eventually led to the impeachment of a President.¹³⁸ Thanks to *In re Madden*, a court can make this conclusion, and deny Drudge standing to claim the journalist’s privilege, even though he gathers information with the sole purpose of dissemination over his website. Furthermore, a court can conclude this even though traditional journalists cover the exact same stories and anxiously read Drudge’s column.¹³⁹ Drudge lacks the pedigree of a journalist, however, so his claim of privilege might very well fail. A judicial inquiry into the validity of what should or should not be news violates First Amendment principles,¹⁴⁰ brings to fruition the *Branzburg* plurality’s fear of content-based discrimination,¹⁴¹ and infringes upon the rights of “lonely pamphleteer[s]” given much greater power thanks to the internet.¹⁴²

¹³⁵ See Godwin, *supra* note 2, at 757 (saying that Drudge likes to gossip).

¹³⁶ See Denniston, *supra* note 122, at 1258 n.14 (citing Matt Bai, *Whispers on the Web: The Gossipy Matt Drudge Roils the Media Elite*, NEWSWEEK, Aug. 18, 1997, at 69, 69) (discussing Drudge’s less-than-discriminating reporting style).

¹³⁷ See *Blumenthal v. Drudge*, 992 F. Supp. 44, 57 n.18 (D.D.C. 1998) (“Drudge is not a reporter, a journalist or a newsgatherer. He is, as he himself admits, simply a purveyor of gossip. His argument that he should benefit from the ‘news gathering exception’ to the long-arm statute merits no serious consideration.”) (citation omitted).

¹³⁸ See *id.*; see also *supra* note 3 and accompanying text (discussing Drudge’s influence and accuracy in the wake of the Lewinski scandal).

¹³⁹ See *Titans of ‘tude*, *supra* note 1, at 32 (naming Drudge one of the 20 media stars of the new journalism and a must read in political circles).

¹⁴⁰ See *Branzburg v. Hayes*, 408 U.S. 665, 705 n.40 (1972) (stating that the First Amendment ordinarily prohibits inquiry into the content of speech).

¹⁴¹ See *id.*

¹⁴² See *id.* at 704.

b. *Drudge Mixes Entertainment with Reporting*

As already discussed, the mainstream media mixes entertainment with journalism on a routine basis.¹⁴³ A court applying *In re Madden* to Drudge, however, could assert that because his reports frequently focus on salacious or titillating details, Drudge's mingling of gossip-based entertainment with journalism denies him standing to assert the journalist's privilege. Just as the *In re Madden* opinion characterizes Madden as a disseminator of hype specializing in hyperbole and satire,¹⁴⁴ a future court could declare Drudge a disseminator of gossip specializing in hyperbole and titillation. Since Drudge's reports have no basis in the news, and his sometimes seamy reports frequently include humor and satire, a court could declare Drudge's reports to be entertainment rather than journalism. Once again, this could happen if a court ignores the very premise of the *von Bulow* test, the newsgatherer's intent, and focuses on *In re Madden*'s misapplication of the test. The traditional media's coverage of the Lewinski matter has proven no better, or no less salacious, than Drudge's reporting,¹⁴⁵ but the traditional media bears the journalist's privilege "stamp of approval"—employment and experience in the professional media.

c. *Drudge Does Not Intend to Disseminate News*

The *In re Madden* logic (i.e. that an entertainment writer has license with the facts that a "true" newsperson lacks) could deny Drudge standing. As *In re Madden* implied, an intent to create a piece of entertainment or art precludes an intent to create news.¹⁴⁶ Thus, a court could imply that Drudge intends something other than the dissemination of news. This line of reasoning poses the greatest threat to practitioners of the new journalism. Courts would be free to apply any purpose to a newsgatherer, regardless of the intent to disseminate information, based upon the content and form of dissemination.

How can a court balance the implied intent of entertainment with the actual intent of supplying information to the public? Can novice reporters, explicitly protected in *von Bulow*,¹⁴⁷ adequately show that entertainment was not their purpose? Obviously, anyone attempting to report news to the public wants as many people as possible to consume the information they provide. The multi-

¹⁴³ See *supra* notes 86–101 and accompanying text (discussing the merger of entertainment and journalism).

¹⁴⁴ See *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998).

¹⁴⁵ See *supra* note 3.

¹⁴⁶ See *Madden*, 151 F.3d at 130.

¹⁴⁷ See *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) ("The burden indeed may be sustained by one who is a novice in the field.").

million dollar salaries of network anchors demonstrate this fact. However, a novice reporter with a website and a modem lacks the billion dollar budgets the traditional press relies upon. Novice reporters, to counteract the huge differences in influence, will try different techniques to get themselves noticed. Like Drudge, they may specialize in "inside the beltway" gossip. They may interweave their stories with social satire and outrageous humor. But traditional reporting, the likes of which can be found on the evening news, will not gain any consumers if done by some "punk kid" on the internet.¹⁴⁸ The evening news has more money, more resources, and can be sought out with minimal effort. To gain attention, new journalists need to offer a fresh spin on the news, be it through entertainment or an outrageously new perspective.¹⁴⁹

In re Madden could deny protection to those individuals who by necessity resort to an unorthodox reporting style. Your site is humorous? Okay, you intend to entertain. Your report contains gossip? Okay, you intend to spread rumors. Under *In re Madden*, the actual intent at the inception of the newsgathering process plays second fiddle to the presumed intent of the report based upon content and presentation. If the court does not approve of the report's style and subject, the individual faces compelled disclosure. The *von Bulow* test offers little protection if the outcome can ignore the fact that an individual "'sought, gathered or received information' . . . with the intention of disseminating that material" and not meet the threshold.¹⁵⁰

B. *The Need to Protect the New Journalism*

Matt Drudge has influenced journalists and politicians of all statures, including the President of the United States.¹⁵¹ Drudge was named in a thirty million dollar libel suit by White House employee Sydney Blumenthal.¹⁵² Clearly, a lone individual with a modem, a website, and a new style of journalism can make powerful and influential enemies. This truth, and the need for the protection of the journalist's privilege, can be found in the events leading to the Blumenthal libel case. After posting the defamatory statements on his

¹⁴⁸ See *supra* note 117.

¹⁴⁹ See generally *Titans of 'tude*, *supra* note 1.

¹⁵⁰ *Madden*, 151 F.3d at 130 (stressing that even though the district court found that Madden sought, gathered, and obtained information from WCW with the intent to distribute that information to the public, more was required to qualify for the journalist's privilege).

¹⁵¹ See *Titans of 'tude*, *supra* note 1, at 32 (stating that, according to the Starr report, President Clinton calls Drudge "Sludge").

¹⁵² See *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 (D.D.C. 1998). For a discussion of the constitutional issues behind the libel case, see Godwin, *supra* note 2, at 758-61.

website,¹⁵³ Drudge received a harshly worded letter from Blumenthal's lawyer demanding a retraction.¹⁵⁴ The letter also included a demand that Drudge disclose the sources for his story.¹⁵⁵ While not court-ordered disclosure, this action demonstrates the threat posed to small practitioners of the new journalism. If the journalist's privilege does not apply to such practitioners, powerful corporations, politicians, and public figures with the means to finance lawsuits can harass novice reporters out of business.¹⁵⁶

Nontraditional journalists contribute to the diversity of expression envisioned by the First Amendment. The Supreme Court has written: "That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . Freedom to publish means freedom for all and not for some."¹⁵⁷ The importance of nontraditional journalists cannot be understated in today's era of media consolidation. According to the Court, "[i]n light of the 'increasingly prominent role of the mass media in our society, and the awesome power it has placed in the hands of a select few,' protection for the speech of nonmedia defendants is essential to ensure a diversity of perspectives."¹⁵⁸ The internet has granted nontraditional journalists immense power at a pivotal time in our nation's history. To allow those journalists to be run out of business, just as the institutional media grows more powerful, would run afoul of the First Amendment's expectation of a diversity of ideas.

VI. EXTENDING PROTECTION TO NONTRADITIONAL JOURNALISTS: BEYOND THE *VON BULOW* TEST

The Supreme Court's *Branzburg* fears have come to fruition. Even though members of the traditional press cling to their status as respected journalists, the

¹⁵³ Drudge reported a rumor that "GOP operatives inside the Beltway think they've got a trump card in dealing with this guy Blumenthal because (they said) he has a history of spousal abuse and there are court records that show that he has this history." Godwin, *supra* note 2, at 758. No court records existed, however, and Blumenthal has no such history. *See id.*

¹⁵⁴ *See id.* at 759.

¹⁵⁵ *See id.*

¹⁵⁶ *See* Paul Allee Curtis, *New Limits on Freedom of the Press: Newsperson's Qualified Privilege Fails to Protect Nonconfidential Video Tape Outtakes—State v. Salsbury*, 34 IDAHO L. REV. 191, 210 n.136 (1997) ("While large media organizations with the resources to fight subpoenas may be less susceptible to deterrence, smaller organizations with fewer resources are likely to think twice about obtaining information which may be subject to subpoenas and the high costs of litigation.").

¹⁵⁷ *Associated Press v. United States Tribune, Co.*, 326 U.S. 1, 20 (1945).

¹⁵⁸ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783 n.9 (1985) (Brennan, J., dissenting) (citations omitted).

realities of tabloid culture demonstrate that the reports of Matt Drudge often mirror those of the established press.¹⁵⁹ Because the Supreme Court has repeatedly ruled against special constitutional protection for the institutionalized press,¹⁶⁰ courts faced with questions of standing in a journalist's privilege context have two choices: abandon the journalist's privilege as the *Branzburg* plurality advised¹⁶¹ or adopt a broad, functional definition of the press.¹⁶²

¹⁵⁹ See Daniel Schorr, *New Journalism, the Old Manipulation*, DES MOINES REGISTER, Feb. 5, 1999, at 11 ("Economic consolidation has put television networks into the hands of conglomerates less interested in news as a mission than as a product in the marketplace. Competition, the remorseless hunt for ratings, has promoted sex, violence and a preference for the titillating over the illuminating.").

¹⁶⁰ See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990) (stating that "the press' unique societal role may not entitle the press to greater protection under the Constitution," but may provide a reason to exempt media corporations from the scope of political expenditure limitations); *id.* at 691 (Scalia, J., dissenting) ("We have consistently rejected the proposition that the institutionalized press has any constitutional privilege beyond that of other speakers."); *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 781–82 (1978) ("The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. But the press does not have a monopoly on either the First Amendment or the ability to enlighten.") (citations omitted); *id.* at 802 (Burger C.J., concurring) (finding "no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches" because "the First Amendment does not 'belong' to any definable category of persons or entities" but to "all who exercise its freedoms"); *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) ("Freedom of the press is a 'fundamental personal right' which is not confined to newspapers and periodicals."); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."); see also Yin, *supra* note 30, at 334 (noting the equality the Supreme Court has read into the Press Clause because the Court "refused to make the institutional press stronger than the non-institutional press").

¹⁶¹ 408 U.S. at 704–705 (declining to find a journalist's privilege, in part, because of the difficulties of defining the press in light of the scope of freedom of the press).

¹⁶² See Lidsky, *supra* note 33, at 230 ("The emergence of new technologies further complicates the problem of choosing between an institutional definition of the press and a functional definition. These new technologies make each citizen capable of becoming the 'lonely pamphleteer' that the First Amendment is designed to protect."). At least two scholars have called for a strict institutional definition of the press. See Leslye DeRoos & Ann K. Grossman, *The Case for a Federal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONST. L.Q. 779, 802–06 (1991) ("Under the model statute, only persons who are . . . employed by or connected with the institutional press can invoke the privilege."). An institutionalized definition ignores the constitutional precedent of a broad definition of freedom of the press as established by the Supreme Court. See *supra* note 91–94. Furthermore, such a definition, while seeking to recognize the legitimate media, ignores the increased sensationalism of traditional journalism. The privilege would apply to NBC news stories accentuating elements of fiction and drama, see *supra* note 127, but deny standing to the

A. A Level Playing Field

If the courts refuse to grant standing to nontraditional journalists, justice would be better served by abandoning the journalist's privilege. Media consolidation places incredible influence in the hands of a few large conglomerates.¹⁶³ Among these media conglomerates, "silent routines . . . keep the subject of self-coverage generally quiescent among writers and reporters without direct managerial involvement."¹⁶⁴ As a result, journalistic freedom to report on issues vital to the interests of parent companies may lie outside the sphere of traditional journalism.

In 1995, media mergers grew to a record 243.¹⁶⁵ Courts would not serve the interests of the First Amendment by granting a journalist's privilege solely to the institutionalized press.¹⁶⁶ Especially in a time of media consolidation, nontraditional journalists have the ability to enhance the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment."¹⁶⁷ For instance, nontraditional journalists can, without fear of reprisal, investigate the defense contract of the parent corporation of a major

traditional reporting of a freelance journalist on the internet. Such a distinction should have no basis in constitutional law or in the world of sensationalized media.

¹⁶³ See Clay Calvert, *The Reporter's Privilege v. the Corporate-Interest Muzzle*: Philip Morris Co., Inc. v. ABC, Inc., 22 U. DAYTON L. REV. 1, 17-22 (1996) (discussing the negative impact media conglomeration has on investigative reporting).

¹⁶⁴ Joseph Turow, *Hidden Conflicts and Journalistic Norms: The Case of Self Coverage*, J. COMM., Spring 1994, at 29, 30.

¹⁶⁵ See Calvert, *supra* note 163, at 21.

¹⁶⁶ See *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting). The *Branzburg* dissent discussed the importance of maintaining an independent press:

As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

Id.

The consolidation of the media hampers diversity of expression and freedom of choice. Independent practitioners of the new journalism, however, can report a wide variety of stories and opinions without risking a parent corporation's rebuke.

¹⁶⁷ *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (quoting *Baker v. F & F Inv.*, 470 F.2d 778, 782 (1972), *cert. denied*, 411 U.S. 966, 966 (1973)).

media outlet. Perhaps such an assertion sounds farfetched, but who could have imagined that gossip floating on the internet would lead to the President's impeachment? Nontraditional journalists should have the same playing field and protection as the institutionalized press.¹⁶⁸ If one group is denied standing, the First Amendment would be best served by eliminating the privilege so that all media outlets, traditional or nontraditional, could compete for access on the same playing field.

B. *An Expanded Functional Definition of the Press*

Courts and scholars have embraced the qualified journalist's privilege. This Comment does not advocate the elimination of the privilege.¹⁶⁹ Rather, this Comment endorses a broad, functional definition of the press that expands upon *von Bulow* and gives the heightened protection to nontraditional journalists that *von Bulow* alone may not be able to provide. Under this functional definition, the elements required to assert the journalist's privilege include: (1) any person who reports on a subject that is a matter of interest to a significant segment of the community;¹⁷⁰ (2) and intends to disseminate information relating to that subject before receiving it;¹⁷¹ (3) by "every sort of publication which affords a vehicle of information and opinion;"¹⁷² (4) including publications that employ entertaining devices such as humor, satire, sarcasm, or elements of fiction.¹⁷³ This definition attempts to broaden *von Bulow* in response to a potential *In re Madden* analysis that should raise concerns for practitioners of the new journalism.

¹⁶⁸ The standard rationale of the journalist's privilege, "[t]he deterrent effect such disclosure is likely to have upon future 'undercover' *investigative reporting*," applies strongly to a situation where only the institutionalized press has standing to assert the privilege. *Id.* at 142–43. An informant armed with the knowledge that his tips are privileged only if given to the traditional press will likely forego all contacts with nontraditional journalists. As a result, the marketplace for the new journalism will dry up as most potential scoops will be funneled through traditional media outlets. Such a result would severely hamper the diversity of expression the First Amendment intends.

¹⁶⁹ The previous discussion merely attempts to illustrate that eliminating the privilege, as the *Branzburg* plurality advocated, would be preferable to a system that embraces an institutionalized definition of the press.

¹⁷⁰ See *supra* notes 91–105 and accompanying text (discussing the constitutional prohibition of content-based discrimination in relation to *In re Madden*).

¹⁷¹ See *infra* note 176 (discussing the intent needed to trigger First Amendment protections for newsgathering).

¹⁷² *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

¹⁷³ See *supra* notes 116–27 and accompanying text (discussing the merger of entertainment and information in today's journalistic landscape).

Madden was criticized for gathering something other than news.¹⁷⁴ The proposed functional definition reads the word “news” out of any analysis and disallows a court from offering its own interpretation as to what news should be. Furthermore, the threshold test’s first element addresses the “practical and conceptual difficulties” of a journalist’s privilege that concerned the *Branzburg* plurality.¹⁷⁵ Like the *von Bulow* test, the new test eschews any institutional definition of journalism and recognizes that freedom of the press is a “fundamental personal right” not confined to the institutionalized press.¹⁷⁶ Because *von Bulow* correctly stated that the journalist’s intent triggers First Amendment protection,¹⁷⁷ the proposed test maintains an intent element. Furthermore, the test embraces the Supreme Court’s broad interpretation of the Press Clause by formally disregarding the means employed to disseminate information.¹⁷⁸

¹⁷⁴ See *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (“Mr. Madden was not investigating ‘news,’ even were we to apply a generous definition of the word.”).

¹⁷⁵ See *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

¹⁷⁶ See *id.* at 704. The *von Bulow* opinion crafted the intent-based test in response to the *Branzburg* plurality’s broad reading of the Press Clause. See *von Bulow v. von Bulow*, 811 F.2d 136, 144–45 (2d Cir. 1987) (quoting *Branzburg*, 408 U.S. at 705) (“[T]he protection from disclosure may be sought by one not traditionally associated with the institutionalized press because ‘[t]he informative function asserted by representatives of the organized press . . . is also performed by [those not associated with the organized press].’”).

¹⁷⁷ Although the *Branzburg* plurality ruled against the journalist’s privilege, the opinion conceded that “news gathering is not without its First Amendment protections.” *Branzburg*, 408 U.S. at 707. Justice Powell’s concurrence, as well as the dissent, also found First Amendment protections for newsgathering. See *id.* at 709 (Powell, J., concurring) (stating that newsmen are not without “constitutional rights with respect to the gathering of news”); *id.* at 727 (Stewart, J., dissenting) (“A corollary of the right to publish must be the right to gather news.”). Because the Court agreed that the First Amendment, to some degree, protected newsgathering, the intent to gather news must be present for one to properly claim the privilege. The First Amendment “provides no basis for claiming a journalist’s privilege by persons who do not begin their investigations with an intent to disseminate information to the public, since no First Amendment rights are implicated under such circumstances.” *von Bulow*, 811 F.2d at 143. “A person who gathers information for personal reasons, unrelated to dissemination of information to the public, will not be deterred from undertaking his search . . .” because of the threat of compelled disclosure. *Id.* As a result, even professional journalists could not assert the privilege if they obtained information in a private, non-journalistic capacity. The journalist’s state of mind, and not the source of their paycheck, determines standing to assert the privilege.

¹⁷⁸ Under this test, Mark Madden would qualify as a journalist. See *Madden*, 151 F.3d 129–30. He intended to report information on professional wrestling, a matter of public interest, before receiving that information from WCW employees. The proposed test prohibits a court from inferring an intent other than the intent to disseminate news even though a report may be entertaining. As a result, Madden’s use of humor and sarcasm could not be used to

C. Applying the Test

A hypothetical application of the test to a reporter like Matt Drudge demonstrates how the test comports with changing journalistic practices, expanding technology, and Supreme Court precedent.

1. *Drudge Intends to Disseminate Information over the Internet*

Drudge easily satisfies two prongs of the expanded functional test. First, Drudge intends to disseminate information before he receives it. He does not gather information for personal reasons unrelated to public dissemination. Rather, Drudge intends to post his reports on his internet site. Second, Drudge's internet site qualifies as a publication of opinion and information.

2. *Drudge Reports on Matters of Interest*

While most journalists and at least one federal court prefer not to label Drudge's reports "news,"¹⁷⁹ his enormous success attests to the fact that his subject matter interests the public.¹⁸⁰ Courts may not like the salacious style or tone of his reports, but courts cannot inquire into the content of his expression.¹⁸¹

show that he intended to entertain or create a work of art.

¹⁷⁹ See *Nightline* (ABC television broadcast, Jan. 8, 1998) (discussing *Newsweek* reporter Michael Isikoff's claim that Drudge engages in water cooler talk, not real reporting, and that he has "poisoned that atmosphere for real reporting"); see also *Blumenthal v. Drudge*, 992 F. Supp. 44, 57 n.18 (D.D.C. 1998) (calling Drudge a gossip and not a news reporter).

¹⁸⁰ The proposed test does not include a public interest requirement. Rather, a report must be of interest to a significant segment of the community. This language broadly encompasses small circulation private newsletters such as employee or community newsletters. See *Baker*, *supra* note 12, at 756-60 (stating that editors of such newsletters should have standing to assert the journalist's privilege). While the public at large may not be concerned with matters of relevance to employees of a particular corporation, a significant group inside the corporation depends upon news about their career opportunities, benefits, and corporate health. "Employee newsletters maintain employee morale and lead to increased productivity." *Id.* at 759. Reports that target significant groups, such as employees or club members, trigger the concerns and protections implicit with newsgathering even if the public at large claims no interest. Freedom of the press is a personal right that applies to individuals regardless of the size of their operation. See *Branzburg*, 408 U.S. at 704. A significant segment of the community can include just about any definable group, regardless of size.

¹⁸¹ See *Branzburg*, 408 U.S. at 705 n.40. However, because the Court has found that newsgathering receives some First Amendment protections, courts must necessarily determine whether expression implicates newsgathering concerns. Speech otherwise protected by the First Amendment may not involve gathering news under the Press Clause. The proposed test attempts to formalize those situations where expression does not require newsgathering

The primary concern for practitioners of the new journalism is that courts will determine that what they are reporting is not news, even if their reports mirror the style of the institutional press. Drudge's reports contain information about public figures and public events, both matters which concern the public. As a result, he would have standing to assert the privilege.

3. *Drudge Intends to Report News*

Drudge's reports tend toward the titillating or salacious side. Clearly, his reports are crafted with entertainment in mind. However, the proposed test clearly states that publications that employ entertaining devices such as humor, satire, sarcasm, or elements of fiction warrant protection. A court would not be free to infer another intention, rather than the intent to disseminate information, simply because the report added elements of entertainment. This element protects those journalists who, because of insufficient funds, resort to unorthodox means of publishing news. Again, Drudge would have standing to assert the privilege.

VII. CONCLUSION

The *von Bulow* test accurately perceived the First Amendment concerns raised by the journalist's privilege. A court must be aware of the broad connotation of the press as well as the intent necessary to implicate protections for newsgathering. However, the seemingly innocuous phrasing of *von Bulow* invites the very content-based discrimination the Court feared in deciding *Branzburg*. The *Branzburg* plurality did not want "to embark the judiciary on a long and difficult journey to such an uncertain destination."¹⁸² However, the federal courts went anyway. In examining the privilege nearly thirty years after *Branzburg*, an ominous trend could develop among those courts to weaken freedom of the press for the computer-age "lonely pamphleteer."¹⁸³ If courts continue to tread where the Supreme Court feared to go, a broad functional

protection. Newspapers designed to shield criminal activity do not implicate Press Clause concerns. One type of expression that should not implicate newsgathering protection involves matter that is not of interest to a significant segment of the community. Although conceptually difficult to comprehend, courts should view this information in a manner analogous to the public figure or matter of public concern dichotomy that comprises constitutional defamation law. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) ("[S]peech on matters of purely private concern is of less First Amendment concern.") A report that does not implicate a matter of concern to a significant segment of the community, regardless of size, should not trigger newsgathering protections.

¹⁸² *Branzburg*, 408 U.S. at 703.

¹⁸³ See *id.* at 704 (stating that freedom of the press applies to the lone pamphleteer).

definition of the press must be utilized to preserve the “fundamental personal right” of freedom of the press.¹⁸⁴ Otherwise, media consolidation could lead to a vacuum filled by only a few voices, the Framers of the First Amendment envisioned as filled by many.

¹⁸⁴ *See id.*

